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In the Supreme Court of the United States

No. 73-171

DOROTHY DAVIS BARR, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on April 30, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1973. The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

I. Whether the complaint states sufficient facts to establish that the Court had jurisdiction under Section 28 U.S.C.A., 1361 against the Secretary of Labor wherein it alleged that an officer of the United States had refused to perform a duty owed to the petitioner as required by a specific statute of the United States as well as a right protected by the Fourteenth Amendment of the United States Constitution.

II. Whether the complaint states sufficient facts to establish that the Court had jurisdiction under Section 42 U.S.C.A., 1983 against the named officers of the States of New Mexico and New York for themselves, or as agents for each other, wherein it alleged they were acting under color of state statutes and caused the petitioner in the State of New Mexico to be deprived of rights secured by the Constitution and Statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, all of which are set forth in Appendix A, are:

Constitution of the United States, Fourteenth Amendment.

42 U.S.C.A. 503 (a) (3)

28 U.S.C.A. 1254 (1)

28 U.S.C.A. 1361

42 U.S.C.A. 1983

STATEMENT OF THE CASE

The factual details outlined in the opinion of the Court of Appeals are correct except for the following:

1. The Court of Appeals stated (opinion, pg. A4) that petitioner Barr's Unemployment Insurance claim was rejected by New York on the ground that she had left her employment voluntarily, however, this should be corrected to add that New York disqualified her for leaving her work voluntarily without good cause, and that she timely appealed this decision (Vol. I pg. 6) under New York Statutes granting her a hearing (§ 620 (1) and § 622 (2), Labor Code, Consolidated Laws of New York annotated) (Vol. I pgs. 11-12) (Second paragraph of the complaint).

2. The appellant did not in her complaint as the Court of Appeals stated (opinion, pg. A5) assert extraterritorial jurisdiction in New Mexico (that she was entitled to require the employer's witnesses to be subpoenaed and brought to New Mexico for cross-examination) but alleged only that she sought information and assistance from the New Mexico agency on the hearing procedures that would be followed in New Mexico (Vol. I pg. 6) so that she could have a hearing as is required by State and Federal Statutes and the Constitution of the United States, which statutes did not except her rights to a hearing because she was not in the State of New York. She was then informed that under interstate procedures of the defendant New Mexico Commission as agent for defendant New York, promulgated by defendant Secretary, she would not receive a hearing but only be allowed to submit sworn statements (Vol. I pgs. 16-17).

3. The Court stated there is nothing in the New York, New Mexico or Federal Statutes that authorizes an "out

of state" hearing for a moving claimant (Op. pg. A8) which is not correct in that § 42 U.S.C.A., 503 (a) (3) and § 620-2 Labor Code of New York provide for a hearing for a Claimant without geographic restrictions which under the National System and rules and regulations is necessary.

The complaint stated that the States and the Secretary could by simple and economic changes allow the state referees in the state of claimant's domicile to give claimant a fair hearing before an impartial tribune (Vol. I pg. 8) (paragraph No. 5 of the complaint).

There are special and important reasons to grant the writ in this case in that the basic issue in the case is of national import and involves a class of persons intended to be aided at a time when they are in urgent need and who after being denied benefits provided by law, are not given a hearing to correct errors merely because they are not physically present in the same state as their previous employers who are granted a hearing. The present system of Unemployment Insurance benefits is a national system funded by federal taxes under federal guidelines for each state and requires a fair hearing to those who are unemployed through no fault of their own and who have been denied benefits.

To get this issue before a court, the right to sue federal officers under 1361 and state officers under 1983 must be established. Since enactment in 1962 of 28 U.S.C.A. § 1361, conflicts in the decisions of various Federal Courts have arisen on the right to sue and mandate federal officers and litigants and the courts are in great need of having these questions settled by this court, which has been silent on the meaning, impact and effect of the new section.

The Court of Appeals found that there was no jurisdiction under Section 1361, as well as all other sections cited, finding that the complaint failed to state facts which would make available relief in the nature of mandamus since the court found that it alleged discretionary acts of the Secretary of Labor in relation to state administration of Unemployment Compensation laws and regulations.

This was the first time that the consensual item surfaced in that the lower court had dismissed the case principally upon the ground that the petitioner had failed to exhaust administrative remedies. The Court of Appeals stated that it did not reach this issue although it was briefed and argued and under present decisions there is no doubt that the lower court erred in its exhaustion ruling (3 Davis Administrative Law Treatise § 20.02).

Section 42 U.S.C.A., 503 (a) (3) places a duty on the Secretary to require states to include provisions for a fair hearing before an impartial tribune for all individuals whose claims for unemployment compensation are denied. The Secretary's act of certification of states for eligibility to participate in the federal distribution of unemployment tax funds under this statute is not a discretionary act. The eligibility factors for certification are clear and if a state does not provide a claimant a fair hearing, it is in violation of the act. This same federal statute does provide a hearing for states contesting the Secretary's decertification, but that process is not involved here (42 U.S.C.A., 504). This court has recently found that the act's administrative remedies as to states are not exclusive and that claimants may enforce its requirements directly. *Java* v. *Department of Human Resources Development,* 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed. 2d 666 (1972).

A fair hearing is an event, and this event is clear, definite and defined. A hearing is a fact. It is, or it isn't and where the complaint states it isn't, it states facts which if proven put the Secretary in violation. It is not a question of his discretion, it is a question of fact and if proven, gives grounds for relief. This the Appeals Court ignores and in essence decides the case in advance of a hearing on the merits finding no jurisdiction.

REASONS FOR GRANTING WRIT

1. The Court of Appeals erred in holding that the petitioners had not sufficiently stated facts to constitute a claim within the jurisdiction of the court under Section 28 U.S.C.A., 1361 and Section 42 U.S.C.A., 1983.

ARGUMENT

I. The petitioners did state facts sufficient to establish jurisdiction against a federal officer in the United States District Court.

Section 1361 has not been construed, interpreted or explained by this court since its enactment by the Congress in 1962. In that period well over fifty decisions of various United States Courts have been handed down with conflicting results as to the meaning, intent and effect of Section 1361. This court has denied Certiorari in a number of cases involving this section, however, these are not of assistance to litigants and courts in understanding Section 1361. A sample of these decisions shows a wide difference in the lower courts' approach and meaning of Section 1361. Some that arrived at the conclusion that 1361 provided jurisdiction and that the intent of Congress was to establish that the sovereign had consented to actions to require officers to perform their duties, found no great ministerial versus discretion difficulty and concluded that it was the intent of Congress to make available a remedy that had been previously withheld or had been enjoyed only in the District of Columbia. *Ashe* v. *McNamara,* (1st Cir. 1965) 355 F.2d 277; *Knoll Assoc.* v. *Dixon,* (DC NY 1964) 232 F. Supp. 283; *Cortright* v. *Resor,* (DC Ed. NY 1971) 325 F. Supp. 797, Rev. O/G, Cert. denied 405 U.S. 965, 3 L.Ed. 2d 240, 92 S.Ct. 1172; *Carey* v. *Local Bd. No. 2, Hartford Connecticut,* (US DC Conn. 1969) 297 F. Supp. 252, Affrd. 412 F.2d 71; *Feliciano* v. *Laird,* (U.S.C.A. 2nd Cir. 1970) 426 F.2d 424; *Grosfeld* v. *Morris,* (4th Cir. 1971) 488 F.2d 1004; *Nat'l Assn. of Govt. Employees* v. *White,* (DC Cir. 1969) 418 F.2d 1126; *Marquez* v. *Hardin,* (U.S. DC N. Calif. 1969); *Peo-*

ples v. *United States Dept. of Agriculture,* 138 U.S. App. DC 291, 427 F.2d 561 (1970).

Taking an opposite stand a number of other courts were equally convinced that either the act of the government official was in fact a discretionary act not mandatable under classic mandamus doctrine or found that even though it might not have been discretionary, defendant officials were entitled to immunity for various other reasons. *McQueary* v. *Laird,* (10th Cir. 1971) 449 F.2d 608 (cited by the court below); *Smith* v. *U. S.,* (10th Cir. 1964) 333 F.2d 70; *McEachern* v. *United States,* (12 CWD SC 1963) 212 F. Supp. 706; *Rose* v. *McNamara,* (ED Pa.) 255 F. Supp. 891; *U. S.* v. *Comm. of Pa.,* (9th Cir. 1965) 343 F.2d 444; *Davis* v. *Schultz,* (3rd Cir. 1971) 453 F.2d 497; *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall,* (10th Cir. 1966) 355 F.2d 364; *Armstrong* v. *U. S.,* (9th Cir. 1965) 354 F.2d 648; *Jarrett* v. *Resor,* (9th Cir. 1970) 426 F.2d 213. Professor Byse in discussing this subject in 81 Harvard Law Review 308, at page 354, states that 1361 actions must always look to the nature of the action sought to be mandated to determine the extent of the value of the ministerial vs. discretionary distinction and counsel should be diligent to prevent a "busy judge" from being misled by these distinctions. At page 334, the author suggests that this type of distinction is unworkable and should be rejected.

The whole area requires the attention of this Court. The reasoning in *Marbury* v. *Madison,* (1803) U.S. (1 CR) 137, 170, wherein it was stated "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined" penetrates the superficialities of discretion vs. ministerial distinctions and in view of the wording of the statute that speci-

fies actions "in the nature of mandamus," those decisions seeking to avoid jurisdiction and to find immunity using the classic mandamus ministerial-discretionary test should be laid to rest. If the nature of the act sought to be compelled is a clear violation of an ultimate existing legal duty owed the plaintiff, the nature of the act should be determinative whether there is in fact a legal duty or merely a claimed right that is superceded by other legal rights and obligations, not whether the officer is exercising discretion. Clearly where the executive is granted a degree of latitude in action, a party cannot claim a duty where only one or more of the alternatives would favor the proponent. The duty must be clear and ultimate. Courts should not evade jurisdiction by fears of encroachment but should be governed by facts and legal rights. Immunity of the sovereign has been and is a fading doctrine. No one today would adhere to the oft quoted law school maxim that the king can do no wrong. The king can do wrong and does and is in court frequently because of this.

For the past 30 years Congress has been expanding this liability and 1361 should now be viewed in this light so that its clear language and the function of a court may be exercised rather than restricted on the basis of case materials no longer applicable. This takes more than a cursory glance at pleadings. The full weight of the Judicial System should be available to determine if a Government official has in fact failed to perform a duty to the plaintiff and, if so, to right the wrong. If evasions such as are now practiced under classic theories of mandamus are allowed to go unchecked, government officials are free to breach their duty if the damages are less than $10,000 or some other grounds cannot be found. This is a false concept of justice and the intent of Congress to

give District Courts jurisdiction as the plain words of the statute proclaim. To read into 1361 restrictions and limitations based upon portions of the Congressional Record that would say that it was the intent of Congress to merely broaden venue conflict with its title and specific wording. To say it created no new tools or remedies is to infer that they already existed. Likewise to say that this existed in the District Court of the District of Columbia under its historical Maryland origin is to ignore the broad interpretation that that Court has given to its version of its jurisdiction. It is now necessary to face up to the problem and resolve it so that 1361 may fully serve its purposes.

Therefore, in accord with this court's traditional sense of justice in resolving conflicting decisions of lower Federal Courts and in the interest of bringing justice to litigants and much needed enlightenment to the judicial system it is incumbent that this court grant Certiorari and enlighten the lower courts as well as litigants on the proper use and meaning of Section 1361.

II. The court erred in finding that the complaint failed to state a claim against the states for violations of the petitioners' constitutional and statutory rights.

This court has recently, frequently and traditionally found that the courts of the United States have jurisdiction to hear invasions of individuals' statutory and constitutional rights under the Civil Rights Statutes of the United States if committed by state officials who do not enjoy federal immunity to suit and this court has, in cases of significant interest and nationwide impact, found that parties whose rights were abused by State officials were entitled to redress (*Java* v. *Department of Human Resources Development,* supra).

The Circuit Court is not as didactic on its dismissal against the states under Section 42 U.S.C.A., 1983 as it is against the federal officers under 28 U.S.C.A., 1361, concluding without stated reasons that petitioner has failed to plead a deprivation of a federally protected right (Op. pg. A9). To say this, the court is sustaining the lower court's finding that the complaint does not allege constitutional questions sufficient to merit a three judge court as requested. The complaint does allege violations of constitutional and federally protected rights which in this case are of a far reaching national import not only affecting petitioner but numerous others throughout the U. S. This court and the Three Judge District Court of the Northern District of California had no trouble in seeing that a violation of 42 U.S.C.A., 503 (a) (3) and the Fourteenth Amendment to the U. S. Constitution in Unemployment Insurance cases merited three judges and jurisdiction and enjoined a state from such violations; *Java* v. *California,* supra. As the lower court in that case noted, "the most fundamental purpose of *both* (emphasis supplied) the federal and the state unemployment compensation laws is to prevent the burden of injured employees becoming charges upon Society. *Abelleira, et al.* v. *District Court of Appeal, et al.,* 17 Cal. 2d 280, 300, 109 P.2d 942, 953 (1941)," *Calif. Dept. of Human Resources Develop.* v. *Java et al.,* 317 F. Supp. 875. Petitioner does have rights under the Federal Statute against both the Secretary and the State of New York and its local admitted agent, New Mexico. If there was a question as to this agency, this should have been resolved in the lower court, but the allegations of the complaint clearly establish its existence (Ex. "D" Vol. I pgs. 16-17).

The petitioner at no time alleged or claimed that personal service on New York was obtained by mailing, but

did allege the agency of New Mexico, the acts in New Mexico and service upon the New Mexico Commission as agent of New York in New Mexico and the Circuit Court admits and recognizes such allegations (Op. pg. A5) and in the next breath finds no state action that creates any rights. The court also pays lip service to Petitioner's rights in New Mexico to invoke the New Mexico Commission's jurisdiction (Op. pg. A6) and then admits its own failure to find jurisdiction seemingly upon a ground of the lack of extra-territorial jurisdiction of states and then states that "The complaint is not free of ambiguity" (Op. pg. A8). The court was on the one hand admitting rights and state action and that possibly the complaint did state facts and on the other hand affirming the District Court that held that the complaint did not state sufficient facts to raise constitutional issues or state a claim in violation of federally protected rights.

The Circuit Court's blanket affirmation of the District Court's blanket denial of all requested relief is in error and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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